MAU KAM TONG & ANOR

v.

THE BOARD OF TRUSTEES OF YAYASAN SABAH & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN
LINTON ALBERT J
[SUIT NO: S26-1989]
18 JANUARY 2005

CONTRACT: *Illegality - Parties not in pari delicto - Whether parties knew that agreements formed part of illegal transaction - Whether claim founded on illegal transaction*

TORT: *Conversion - Detinue - Conversion of goods - Whether possession or right to possession need to be pleaded*

TRADE AND INDUSTRY: *Forestry - Possession of merchantable timber without lawful authority - Whether illegal - Whether liable to be seized - Forest Enactment 1968, s. 24(6)*

The plaintiffs claimed to be the owners and entitled to 3008 merchantable logs which the director of forest (2nd defendant) seized, detained and gave to Yayasan Sabah (1st defendant). According to the plaintiffs, the logs were purchased and fully paid for pursuant to agreements concerning merchantable timber in the respective areas covered under two timber licences. The plaintiffs sought damages against the 1st defendant for conversion and against the 2nd defendant and 3rd defendant (the government of the State of Sabah) in negligence.

The defendants pleaded the defence of illegality. The defendants claimed that the agreements for the sale of merchantable timber relied on by the plaintiffs constituted transactions deemed illegal by virtue of s. 24(6) of the Forest Enactment, 1968. There was no controversy as to the illegality of the transactions in the present case as there had been contravention of s. 24(6) of the Forest Enactment 1968. The defendants further contended that the 3008 logs did not come from the areas under the two licences. Survey and mapping works carried out by the 1st defendant showed that illegal logging had been carried out within the 1st defendant's concession area comprising about 640 hectares. Based on the defendants' estimation, the total volume which could have been extracted from the 640 hectares was equal to the total volume of the 3008 disputed logs. It was also argued that only the plaintiffs could have

perpetrated the illegal logging within the 640 hectares because there was conclusive proof that the 1st defendant had not commenced logging there and no one else was doing any logging in the vicinity. In addition to the plea of illegality, the 2nd and 3rd defendants also relied on s. 40 of the Forest Enactment, 1968 in defence to the plaintiffs' claim in negligence.

The 1st defendant also contended that the plaintiffs' claim founded on the tort of conversion must fail because their claim as pleaded was on the basis that they were the owner and/or entitled to the 3008 logs and not on the ground that they were in possession of those logs. It was argued, therefore, that the plaintiffs' failure to plead possession or right to immediate possession was fatal.

Held (allowing the plaintiffs' claim):

[1] The agreements under which the logs were purchased were *ex facie* lawful and the purchasers were never in delicto because they did not know that the agreements formed part of the illegal transactions. The plaintiffs did not seek, nor did they found their claim on the illegal transactions. The defence of illegality was to no avail. (pp. 356 a & 359 a)

[2] There was no nexus whatsoever between the illegal logging and the 3008 disputed logs. There was no evidence to show that the 3008 disputed logs were the product of the illegal logging. The defendants had failed to establish, on a balance of probabilities, their pleaded defence that the 3008 logs were from the areas outside the areas under the two licences. (pp. 357 h & 358 a)

[3] The plaintiffs' plea was consistent with their claim in conversion. Possession or right to possession constitute evidence upon which the claim is founded and therefore, need not be pleaded (O. 18 r. 7(1) RHC 1980). The defendants were precluded from raising this matter because they failed to object to the plaintiffs adducing evidence of possession. In fact, the plaintiffs were in actual possession of the 3008 logs which entitled the plaintiffs to sue the 1st defendant in conversion. The 1st defendant was liable for conversion. (pp. 358 g & 359 h, i)

[4] The act of the second defendant in seizing the 3008 logs and giving them to the first defendant without first ascertaining that they were illegally felled logs let alone logs felled from the first defendant's licensed area constituted gross negligence. Clearly, s. 40 of the Forest Enactment 1968 did not give any protection to the second defendant. The third defendant was also liable because the second defendant was the servant or agent of the third defendant. (p. 360 c, e)

Case(s) referred to:

Anthony Dubis v. Syarikat Kuin Je Sdn Bhd [1996] 1 LNS 81 HC ***(refd)***
BBMB Finance (HK) Ltd v. Eda Holdings Ltd & Ors [1991] 2 All ER 129 ***(refd)***
Berenger v. Rozario [1953] 1 LNS 7 HC ***(refd)***
Chu Yin Foh v. Superwood Sawmill (S) Sdn Bhd [1999] 1 LNS 15 HC ***(refd)***
Cysan Development Sdn Bhd v. Majunis Tumpi & Ors [1997] 3 CLJ 396 HC ***(refd)***
Daniel D William v. Luhat Wan & Ors & Another Case (No 2) [1990] 1 CLJ 472; [1990] 1 CLJ (Rep) 762 HC ***(refd)***
Jagindar Singh & Ors v. Tara Rajaratnam [1986] 1 CLJ 257 HC ***(refd)***
International Factors Ltd v. Rodriguez [1979] 1 All ER 17 ***(refd)***
Kahler v. Midland Bank Ltd [1949] 2 All ER 621 ***(refd)***
Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd [1983] 1 MLJ 325 ***(refd)***
Lam Teik Kai v. Hallam Nominees Ltd & Ors [1970] 1 LNS 55 HC ***(refd)***
Lo Su Tsoon Timber Depot v. Southern Estate Sdn Bhd [1970] 1 LNS 68 FC ***(refd)***
Mcc Proceeds Inc v. Lehman Bros International (Europe) [1998] 4 All ER 675 ***(refd)***
Sajan Singh v. Sardara Ali [1959] 1 LNS 90 PC ***(refd)***
Sundang Timber Co Sdn Bhd v. Kinabatangan Development Co Sdn Bhd [1976] 1 LNS 148 FC ***(refd)***
Superintendent Of Lands And Surveys 4th Division & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***

Legislation referred to:

Forest Enactment 1968, ss. 24(6), 40
Rules of High Court 1980, O. 18 r. 7(1)
Social and Welfare Services Lotteries Board Act 1950, s. 9(1)

For the plaintiffs - Datin Marina Tiu; M/s Yap, Chin & Tiu
For the 1st defendant - Nobert Yapp; M/s Jayasuriya Kah & Co
For the 2nd & 3rd defendants - Athmat Hassan; State AG's Chambers

Reported by Amutha Suppayah

JUDGMENT

Linton Albert J:

In this case the plaintiff's claim to be the owners and entitled to 3008 merchantable logs which the Director of Forest (2nd defendant) seized, detained and gave to Yayasan Sabah (1st defendant). One is immediately reminded of the medieval Robin Hood who robbed the rich to give to the poor but here it was incomparably worse because the plaintiff's were not rich and the 1st defendant not poor. According to the plaintiff's the logs were purchased and fully paid for by one Mau Ming (deceased) and Tang Yiu Chi, one of the plaintiff's (together called the partners) while they were partners trading under the name and style of Syarikat Lama, pursuant to two separate agreements both dated 15 January 1983, concerning merchantable timber in the respective areas covered under two timber licences, namely, Licence To Take Forest Produce

number FOLK 27/79 and Licence to Take Forest Produce number FOLK 7/80. The plaintiff's are now seeking damages against the 1st defendant for conversion and against the 2nd and 3rd defendants in negligence. The defendants pleaded the defence of illegality.

It is not disputed that the partners were also attorneys for the respective licencees of the two timber licences and contractors for the extraction of timber in the areas covered under those two licences which, coupled with the agreement for the sale of merchantable timber relied on by the plaintiff's, constituted transactions deemed illegal by virtue of s. 24(6) of the Forest Enactment, 1968.

Section 24(6) of the Forest Enactment 1968 reads as follows:

> A licence shall be personal to the holder thereof and shall not be transferable in any manner whatsoever, and shall cease to be valid on the death of such holder or if such holder is declared to be insolvent under the provisions of any written law.

Learned counsel for the 1st defendant, Mr. Nobert Yapp, brought to my attention several decided cases where our courts held that transactions similar or identical to the type established in the present case were illegal and claims based on those transactions unenforceable. They were *Lo Su Tsoon Timber Depot v. Southern Estate Sdn Bhd* [1970] 1 LNS 68; *Sundang Timber Co. Sdn Bhd v. Kinabatangan Development Co Sdn Bhd* [1976] 1 LNS 148; and the more recent cases were *Anthony Bin Dubis v. Syarikat Kuin Je Sdn Bhd* [1996] 1 LNS 81; *Cysan Development Sdn Bhd v. Majunis Bin Tumpi & Ors* [1997] 3 CLJ 396 HC and *Chu Yin Foh v. Superwood Sawmill (S) Sdn Bhd* [1999] 1 LNS 15. There was no controversy as to the illegality of the transactions in the present case as their effect was to transfer the two licences to the partners in contravention of s. 24(6) of the Forest Enactment 1968. It was therefore, argued that in the circumstances, the plaintiffs' claim must necessarily fail, there being no compelling reason to depart from those cases cited by learned counsel for the 1st defendant. Indeed, Lo Tsu Tsoon Timber and Sundang Timber were cases of high authority. This would, in effect, have meant that the ghost of Robin Hood had come back to haunt the plaintiffs and must in these circumstances, be exorcised; otherwise, the plaintiffs' grievance would not be remediable, the 1st defendant unjustifiably enriched as the beneficiary of a totally unexpected windfall and the public purse not better off by the sale of the logs the proceeds of which the 1st defendant pocketed, and the 2nd defendant oblivious to the injustice of the arbitrary seizure of the 3008 logs for the benefit of the 1st defendant. With respect, the principle illustrated in those cases did not, in my judgment, cover the facts of the present case.

Here, agreements under which the logs were purchased were *ex facie* lawful and the partners were never in delicto because they did not know that the agreements formed part of the illegal transactions (see *Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd* [1983] 1 MLJ 325); the plaintiffs did not seek, nor did they found their claim on the illegal transactions (see *Berenger v. Rozario* [1953] 1 LNS 7); hence, in my judgment, the facts before me constituted an exception to the general principle laid down in the cases relied on by the 1st defendant, learned counsel for the plaintiffs, Datin Marina Tiu relied on *Sajan Singh v. Sardara Ali* [1960] 26 MLJ 52 and *Daniel D William v. Luhat Wan & Ors & Another Case (No 2)* [1990] 2 MLJ 48. In Sajan Singh the plaintiff and the defendant entered into an illegal transaction whereby the defendant purchased and registered a lorry in his own name with the plaintiff's money. The defendant also obtained a haulage permit for the lorry in his own name but all along it was intended that the lorry should belong to the plaintiff and be used by him for his haulage business. The plaintiff used the lorry as his own and kept it at his address but the business connected with the lorry was done in the defendant's name. Subsequently they fell out and one day the defendant took the lorry away and refused to return it claiming it belonged to him. It was held that the plaintiff was entitled to damages in detinue. Lord Denning at p. 54 had this to say in relation to the plaintiff's claim:

> In order to succeed in detinue, it was essential for the plaintiff to show that he had the right to immediate possession of the lorry at the time of commencing the action, arising out of an absolute or special property in it, see Bullen & Leake, 3rd Edn. p. 312. And in detinue their Lordships think he succeeded. Although the transaction between the plaintiff and the defendant was illegal, nevertheless it was fully executed and carried out: and on that account it was effective to pass the property in the lorry to the plaintiff.

In Daniel s/o D. William the first defendant had purchased the winning welfare lottery ticket from the seller who had admitted that he had not been issued with a written authority either by the Director-General of Posts or the chairman of the board to sell welfare lottery tickets thus contravening s. 9(1) of the Social and Welfare Services Lotteries Board Act 1950. It was contended that the contract of sale for the purchase of the winning ticket by the first defendant from the seller was an illegal contract and the first defendant could not therefore prove his title by proving he was the owner by relying on the illegal contract. In rejecting this contention Lim Beng Choon, J, said this at p. 54:

> Applying the principles expounded in the authorities cited above to the present case, I am inclined to hold and I do so hold that assuming that the contract of sale between DW2 and the first defendant was illegal, nevertheless, since the illegal contract was fully executed and the title to the winning ticket had passed to the first defendant, the winning ticket must belong the first defendant.

In the circumstances, applying the principles set out in the above authorities, I am satisfied that the defence of illegality was to *no avaii*.

The next question to consider is the defendants' plea that the 3008 logs did not come from the areas under the two licences. Firstly, the defendants relied on two letters written by the plaintiffs to the Forestry Department and PW2's testimony to the effect that his company had written to the Forestry Department as well as Malayan Banking Berhad admitting felling of timber in the 1st defendant's concession area by his company's subcontractor, one Borhill Sdn Bhd.

Secondly, it was submitted for the defendants, that the total volume of logs extracted from the areas covered under the two licences was considerably more than the estimated volume and this was so even though the 3008 disputed logs did not feature in the defendants' calculations based on royalty payments. Hence, it was argued, the only logical conclusion was that the plaintiffs had operated outside the areas under the two licences.

Thirdly, the survey and mapping works carried out by the 1st defendant's team of surveyors and enumerators showed that illegal logging had been carried out within the 1st defendant's concession area comprising about 640 hectares. According to learned counsel for the 1st defendant, based on the defendants' estimation of timber stand at 20 cubic metres per hectare, the total volume which could have been extracted from the 640 hectares was 12,800 cubic metres which was equal to the total volume of the 3008 disputed logs. It was also at the same time argued that only the plaintiffs could have perpetrated the illegal logging within the 640 hectares because there was conclusive proof that the 1st defendant had not commenced logging there and no one else was doing any logging in the vicinity.

And fourthly, the discovery within the 1st defendant's concession area of logging machinery operated by the plaintiffs' workers and the irregularity of the numbering relating to the 3008 logs which meant, therefore, that these logs were not from the areas under the two licences.

There was certainly overwhelming evidence to the effect that the partners had directly or indirectly engaged in illegal logging outside the areas covered under the two licences for which they could and should have been prosecuted or penalized under the relevant provisions of the Forest Enactment 1968 but at the same time, I am also equally satisfied that there was no nexus whatsoever between the illegal logging and the 3008 disputed logs. There was not even a shred of evidence to show that the 3008 disputed legs were the product of the illegal logging. The arithmetical calculations and linguistical deductions

espoused by learned counsel for the 1st defendant, do not, in my judgment constitute proof; the conclusions were, therefore, absolutely misconceived. In the circumstances, I hold that the defendants have failed to establish, on a balance of probabilities, their pleaded defence that the 3008 logs were form the areas outside the areas under the two licences.

I shall now consider the other issues raised by learned counsel for the 1st defendant in relation to the tort of conversion upon which the plaintiffs' claim was founded. Conversion exists when:

> Anyone who without authority takes possession of another man's goods with the intention of asserting some right or dominion over them.
>
> In other words, anyone who deals with goods in a manner inconsistent with the right of the true owner is guilty of a wrongful conversion; provided there is an intention on the part of the person so dealing with them to negative the right of the true owner or to assert a right inconsistent therewith.

(see Clerk & Lindsell *On Torts*, Sixth edition [1226]):

> To sustain a claim founded in conversion the claimant must show that he had either possession, or an immediate right to possession, of the chattel at the material time of the act. Either relationship with the chattel would provide the claimant with the required possessory title to support the action in conversion.

(see Halsbury's *Laws Of Malaysia*, vol. 5 [80,468])

It was contended by the 1st defendant that the plaintiffs'claim must fail because their claim as pleaded in their amended statement of claim was on the basis that they were the owner and or entitled to the 3008 logs and not on the ground that they were in possession of those logs which the plaintiffs sought to and did establish. It was argued, therefore, that the plaintiffs' failure to plead possession or right to immediate possession was fatal. I agree with the response made by learned counsel for the plaintiffs. Firstly, the plaintiffs' plea is consistent with their claim in conversion; secondly, possession or right to possession constitute evidence upon which the claim is founded and therefore, need not be pleaded (see O. 18 r. 7(1) RHC 1980); and thirdly, the defendants were precluded from raising this matter because they failed to object to the plaintiffs adducing evidence of possession (see *Superintendent Of Lands And Surveys 4th Division & Anor v. Hamit Matusin & Ors* [1994] 3 CLJ 567 SC).

Learned counsel for the 1st defendant also contended that an essential ingredient of the tort of conversion was that a plaintiff must prove that he was the owner of the goods. I do not share the view that the cases cited support this proposition. In *Lam Teik Kai v. Hallam Nominees Ltd & Ors* [1970] 1 LNS

55 the issue as whether there was evidence to show any positive wrongful act of the defendant in dealing with the plaintiff's shares. It was held that the defendant was not liable in conversion because the plaintiff failed to prove that there had been a positive wrongful act on the part of the defendants of dealing with the plaintiff's shares in a manner inconsistent with the plaintiff's right. The question of ownership or otherwise of the shares by the plaintiff was not an issue and therefore distinguishable from the present case. *Daniel D. William v. Luhat Wan & Ors (supra)* is in fact authority for the proposition that a plaintiff needs only to show proof of the right to immediate possession, a view correctly expressed by learned counsel for the plaintiffs, in contrast to the erroneous view held by learned counsel for the 1st defendant that that case supports the requirement that a plaintiff must prove ownership before he can succeed in an action for conversion, *International Factors Ltd v. Rodriguez* [1979] 1 All ER 17 is of no assistance to the 1st defendant and runs counter to its contention. It was held in that case that the plaintiffs were entitled to sue in conversion because they had a right to immediate possession of the cheques which were the subject of the dispute. Finally, as to *Kahler v. Midland Bank Ltd* [1949] 2 All ER 621 it is only necessary to refer to a passage in the judgment of Lord Normand at p. 628:

> In the present case, therefore, it is not sufficient that the appellant has established his title to the ownership of the shares. The bailee is entitled to demand proof that he is entitled to immediate possession.

In the circumstances, therefore, the 1st defendant's contention is clearly misconceived.

It is not disputed that royalties on the 3008 logs were not paid when they were seized by the 2nd defendant and given to the 1st defendant. The two licences expressly provide that until royalty has been paid the timber shall be deemed to be the property of the 3rd defendant. Hence, it was argued that in order to succeed the plaintiffs must show that they were in possession of a valid licence and had paid royalties on the logs. There is no merit in this argument. All that the plaintiffs need to show, which they did, was that the two licences were valid and timber extracted under those licences was purchased from the licensees, the effect of which was sufficient to clothe the plaintiffs with the essential requirement of possession of the 3008 logs. In fact, the plaintiffs were in actual possession of the 3008 logs which entitled the plaintiffs to sue the 1st defendant in conversion (see *Mcc Proceeds Inc v. Lehman Bros International (Europe)* [1998] 4 All ER 675).

In the circumstances, the plaintiffs have established their claim and for the reasons stated above the 1st defendants' pleaded defences are devoid of merit and I accordingly find the 1st defendant liable for conversion. In addition to the

plea of illegality the 2nd and 3rd defendants' pleaded defence to the plaintiffs' claim in negligence is s. 40 of the Forest Enactment, 1968 which reads as follows:

> The government, forest officers and police officers shall not be held responsible for any loss or damage which may occur in respect of any forest produce while detained by, or otherwise in the custody of, and such officer under this Enactment or the rules, or in respect of any timber taken into possession under s. 26 of this Enactment, unless such loss or damage arose out of the malicious, fraudulent or grossly negligent act of any such officer.

It is patently clear that the act of the second defendant in seizing the 3008 logs and giving them to the first defendant without first ascertaining that they were illegality felled logs let alone logs felled from the first defendant's licensed area constituted gross negligence. The act of the second defendant was so grossly negligent that I need not dignify it with any elaboration. Clearly, s. 40 of the Forest Enactment 1968 does not give any protection to the second defendant.

There is also no merit in the second and third defendants' plea that the plaintiffs have no *locus standi* and are not entitled to the 3008 logs. The plaintiffs have clearly established that they were in actual possession of the logs pursuant to the two licences and the agreements made with the licensees thereof when they were seized and given to the first defendant.

I, therefore, hold that the second defendant was grossly negligent and liable to the plaintiff for their loss. The government of the State of Sabah (the third defendant) is also liable because the second defendant is the servant or agent of the third defendant.

The plaintiffs have adduced evidence of the total value of the 3008 logs which constitute their loss. The amount arrived at was RM2,077,169.68. This is neither disputed nor challenged by the defendants and would, therefore, be the measure of damages the plaintiffs are entitled to (see *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1986] 1 CLJ 357; *BBMB Finance (HK) Ltd v. Eda Holdings Ltd & Ors* [1991] 2 All ER 129). I decline, however, to award an additional sum to reflect the devaluation of the ringgit. This is to account for the royalties the plaintiffs would otherwise have paid in respect of the 3008 logs.

In the circumstances, therefore, the plaintiffs are entitled to the claim they ask for in their statement of claim against the 1st, 2nd and 3rd defendants and I accordingly enter judgment for the plaintiff in the sum of RM2,077,169.68 with interest thereon at 8% per annum from date of judgment until full settlement with costs to be taxed unless agreed.